IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 11, 2009 Session

AUBREY E. GIVENS, ADM. OF THE ESTATE OF JESSICA E. GIVENS, ET AL. v. THE VANDERBILT UNIVERSITY, ET AL.

Appeal from the Circuit Court for Davidson County
No. 07C3138 Amanda McClendon, Judge

No. M2008-02025-COA-R3-CV - Filed August 18, 2009

Medical malpractice action was dismissed on summary judgment following plaintiffs' failure to oppose defendant's motion. Plaintiffs filed a motion to set aside the judgment of the trial court based on mistake where plaintiffs did not receive service of defendant's summary judgment motion. The trial court denied plaintiffs' motion; plaintiffs appeal. Finding that, under the facts of this case, the judgment should have been set aside, we reverse and remand.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S. and ANDY D. BENNETT, J., joined.

Aubrey T. Givens, Nashville, Tennessee, for the appellants, Aubrey E. Givens and Jessica R. Givens.

Steven E. Anderson and Erin Palmer Polly, Nashville, Tennessee, for the appellees, the Vanderbilt University, Vanderbilt University Hospital, John H. Dixon, Jr., M.D., and John Doe.

MEMORANDUM OPINION[1]

Plaintiffs, Aubrey E. Givens, Administrator of the Estate of Jessica E. Givens, deceased, and Aubrey E. Givens and Jessica R. Givens, individually, filed a Complaint on October 26, 2007, alleging medical malpractice stemming from Jessica E. Givens' hospital stay at Vanderbilt University Hospital and the care of Dr. John Dixon. Defendants filed an Answer on February 22, 2008, and a Motion for Summary Judgment on March 26. The Motion for Summary Judgment

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[1] Tenn. R. Ct. App. 10 states:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

certified that a copy of the motion was sent via U.S. Mail to Plaintiffs' counsel. The certificate of service listed the correct address, but Plaintiffs' counsel did not receive it; as a result, Plaintiffs did not respond to the motion or attend the hearing on the motion held May 9. At the hearing, the trial court granted Defendant's motion based on Plaintiffs' failure to oppose the motion. Later that day, Defendants submitted a proposed order to the trial court and certified that a copy was sent to Plaintiffs' counsel. Within a few days, Plaintiffs' counsel received the copy of the proposed order and called Defendant's counsel to inform her that Plaintiffs had not received a copy of Defendant's summary judgment motion and were, therefore, unaware there had been a hearing. The trial court entered its order dismissing Plaintiffs' claims with prejudice on May 15.

On June 16, Plaintiffs filed a Motion to Set Aside the trial court's final judgment pursuant to Tenn. R. Civ. P. 60.02 on the ground that Plaintiffs had not received service of the summary judgment motion and, consequently, were unable to respond prior to the hearing on the motion. The motion was supported by the Affidavit of Aubrey T. Givens, Plaintiffs' counsel, explaining that (1) he personally checks the mail in his law office daily; (2) that he was present in the law office when the postal service would have reasonably delivered the copy of the motion; but (3) that he never received Defendant's motion. A hearing was held on August 1, following which the trial court denied Plaintiffs' motion stating, "[n]ine months after filing the Complaint and two and one-half months after entry of the Court's Order granting Defendants' Motion for Summary Judgment, Plaintiffs have failed to disclose an expert witness to support their claims."

Plaintiffs appeal, asserting that the trial court erred in denying their motion to set aside the order granting summary judgment since they did not receive service of the motion and were, thus, unable to timely oppose the motion. Defendants contend that there is a presumption that service provided via U.S. mail was received and that, in any event, Plaintiffs had more than two months between the time they learned of the summary judgment motion and the time the court entered its order denying their motion to set aside the judgment in which to file a pleading in opposition to summary judgment, but that they failed to do so; consequently, they assert, the trial court properly granted summary judgment and denied Plaintiffs' motion to set aside.

Analysis

Our standard of review of the denial of Tenn. R. Civ. P. 60.02 relief was stated in *Underwood v. Zurich Insurance Co.*, 854 S.W.2d 94 (Tenn. 1993). A motion for relief based on Rule 60.02 addresses itself to the sound discretion of the trial judge, and the scope of review of an appellate court is to determine if that discretion was abused. *Id*. at 97. Thus, the trial court's decision to deny relief under Rule 60.02 is reviewed under an abuse of discretion standard. *See Day v. Day*, 931 S.W.2d 936, 939 (Tenn. Ct. App. 1996). Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *Eldridge v. Eldridge,* 42 S.W.3d 82, 85 (Tenn. 2001) (citing *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000)). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *Id.* (citing *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn.1999)). Under the abuse of discretion standard, the appellate court may

not substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

The party seeking relief under Tenn. R. Civ. P. 60.02 has the burden "to set forth in a motion or petition, or in affidavits in support thereof, facts explaining why the movant was justified in failing to avoid mistake, inadvertence, surprise or neglect." *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991) (citing *Hopkins v. Hopkins*, 572 S.W.2d 639, 640 (Tenn. 1978)). If there is any reasonable doubt about whether the judgment should be set aside, the court should grant relief. *Id.* (citing *Nelson v. Simpson*, 826 S.W.2d 483, 486 (Tenn. Ct. App. 1991)).

In the present case, Plaintiffs' counsel, Aubrey T. Givens, filed an affidavit in support of the Rule 60.02 motion explaining that he "almost without fail go[es] through each item of received at my office address, review all mail addressed to my law firm and distribute the mail to the appropriate persons," and further that he "was in [his] office on the days that the U.S. mail would have reasonably delivered the Defendant's Motion for Summary Judgment," but that in "[g]oing through the mail, at no point did I receive a copy of the Defendant's Motion for Summary Judgment." Defendants did not dispute or otherwise challenge the veracity of Mr. Givens' affidavit or any assertion therein.

Under Tennessee law, there is a rebuttable presumption that service by U.S. mail was received upon proof that the mail was properly addressed, properly stamped, and duly deposited with the post office. *Auto Credit of Nashville v. Wimmer*, 231 S.W.3d 896, 902 (Tenn. 2007). The parties agree that the mailing in question met this standard; however, that agreement does not settle the issue since the presumption of receipt is a rebuttable one. Mr. Givens' affidavit rebutted the presumption of receipt and satisfied the requirement of Rule 60.02 that he set forth "facts explaining why [Plaintiffs were] justified in failing to avoid mistake, inadvertence, surprise or neglect." *Toney v. Mueller Co.*, 810 S.W.2d at146. Because Plaintiffs did not receive service of the motion by some error or mistake, they were unable to timely respond and their Rule 60.02 motion should have been granted. *Id.* While Plaintiffs were not precluded from filing a response to the summary judgment motion as part of their request for Rule 60 relief, they were not required to do so and the trial court incorrectly focused on the fact that Plaintiffs did not file a response to the motion rather than on their entitlement to relief under Rule 60.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the trial court and remand for further proceedings.

Costs of the appeal are taxed to the Appellees for which execution may issue if necessary.

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RICHARD H. DINKINS, JUDGE